

IN THE SUPREME COURT OF FLORIDA

FILED
SID L. WHITE

MAR 15 1991

CLERK, SUPREME COURT

By 
Deputy Clerk

STATE OF FLORIDA,
Petitioner,

v.

MATTHEW KENNY,
Respondent

Case. No. 77611

ON APPEAL FROM THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

PETITIONER'S BRIEF ON JURISDICTION

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

DAVID R. GEMMER
Assistant Attorney General
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813) 873-4736

OF COUNSEL FOR THE STATE

TABLE OF CONTENTS

TABLE OF CASES	i
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF THE ARGUMENT	1
ARGUMENT	2
CONCLUSION	2

TABLE OF CASES

<u>Carter v. State,</u> 15 F.L.W. D2911 (Fla. 4th DCA Dec. 5, 1990),	2
<u>Flowers v. State,</u> 567 So.2d 1055 (Fla. 5th DCA 1990),	2
<u>Lewis v. State,</u> 16 F.L.W. D352 (Fla. 2d DCA Feb. 1, 1991),	2
<u>State v. Lewis,</u> No. 77,551 (Fla., pet. for rev. filed Mar. 1, 1991),	2
<u>State v. Scott,</u> No. 77,415 (Fla., petitioner's brief on jurisdiction served Mar. 11, 1991),	2
<u>State v. Worley,</u> No. 77,417 (Fla., petitioner's brief on jurisdiction served Mar. 11, 1991),	2
<u>Walker v. State,</u> 546 So.2d 764 (Fla. 5th DCA 1989),	2

STATEMENT OF THE CASE AND FACTS

The trial court used a multiplier for "legal constraint" on the guidelines scoresheet for multiple offense occurring while respondent was under legal constraint. The second district adhered to decisions now pending before this court for the principle that no multiplier may be used on a single scoresheet.

SUMMARY OF THE ARGUMENT

The second district relied on cases now pending before this court. Those cases, in turn, recognize conflict with the fourth and fifth districts. This court accepts jurisdiction where cases pending before this court are relied upon in a decision below.

ARGUMENT

THE DECISION RELIES UPON CASES NOW PENDING BEFORE THE SUPREME COURT, AND IS IN DIRECT AND EXPRESS CONFLICT WITH DECISIONS OF OTHER DISTRICTS

The second district relied upon three decisions from the district in support of its decision sub judice (copy attached). Those cases are now pending before this court: State v. Scott, No. 77,415 (Fla., petitioner's brief on jurisdiction served Mar. 11, 1991); State v. Worley, No. 77,417 (Fla., petitioner's brief on jurisdiction served Mar. 11, 1991); State v. Lewis, No. 77,551 (Fla., pet. for rev. filed Mar. 1, 1991). A review of the lower court decision in the lead case of this trilogy, Lewis v. State, 16 F.L.W. D352 (Fla. 2d DCA Feb. 1, 1991), shows that the second district recognizes its conflict and disagreement with Walker v. State, 546 So.2d 764 (Fla. 5th DCA 1989), Flowers v. State, 567 So.2d 1055 (Fla. 5th DCA 1990) (most likely also pending before this court, as the question was certified), and Carter v. State, 15 F.L.W. D2911 (Fla. 4th DCA Dec. 5, 1990).

This court has consistently accepted jurisdiction in cases where the district court cites to cases currently pending before this court, to ensure consistency and equal application of justice. This court should do so in the instant case.

CONCLUSION

Jurisdiction should be accepted.

Respectfully submitted,

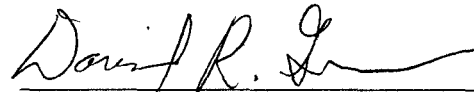
ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



DAVID R. GEMMER
Assistant Attorney General
2002 N. Lois Ave. Suite 700
Tampa, Florida 33607-2366
(813) 873-4736
Florida Bar # 370541

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Robert D. Rosen, Assistant Public Defender, Public Defender's Office, Polk County Courthouse, P.O. Box 9000--Drawer PD, Bartow, Florida 33830, this date, March 13, 1991.



OF COUNSEL FOR THE STATE